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No. 89-334

In the Supreme Court of the United States

OCTOBER TERM, 1989

PHILIP ORTEGA,
Petitioner,

vs.

CITY OF KANSAS CITY, KANSAS,
a Municipal Corporation,
POLICE CHIEF ALLAN MEYERS,
DETECTIVE RANDALL MURPHY,
LT. RONALD L. MILLER,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
TENTH CIRCUIT**

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STATEMENT OF THE CASE

Respondents concur with Petitioner's Statement of the Case.

REASONS WHY WRIT SHOULD BE DENIED

A. Summary of Argument

Although petitioner does not specifically identify the subsection of Supreme Court Rule 17.1 on which he relies in seeking a writ of certiorari, he evidently contends that this case presents "an important question of federal law which has not been, but should be, settled by this Court," Sup.Ct. Rule 17.1(c), and that the Tenth Circuit's decision is "in conflict with the decision of another federal court of appeals on the same matter." Sup.Ct. Rule 17.1(a).

Petitioner asserts that the ruling by the Tenth Circuit Court of Appeals is one of "first impression" and has "in effect erased from the Constitution a substantial portion of the extradition guaranties granted to every person of the United States of America." (Petitioner's brief, pp. 10 and 17).

Although petitioner does not argue that the Tenth Circuit's decision is in direct conflict with the decisions of the other circuits, he asserts that the Tenth Circuit "narrowly" interpreted cases from five other circuits. (Petitioner's brief, pp. 14 and 15).

Contrary to petitioner's contention, this case does not present an important question of federal law. The petitioner repeatedly states that the Tenth Circuit's decision jeopardizes a person's pre-arrest right to extradition. Petitioner, however, fails to identify any source

in the Constitution, federal statutes, or case law that creates a right to extradition prior to arrest. As the Tenth Circuit emphasized, both Article IV, Section 2, Clause 2 of the United States Constitution and 18 U.S.C. Sec. 3182 (1985) refer to extradition on "demand." *Ortega v. City of Kansas City, Kansas*, 875 F.2d 1497, 1499-1500 (10th Cir. 1989).

Lacking any source for a pre-arrest right to extradition, petitioner resorts to histrionics to create the impression of an important federal question. Petitioner claims that the Tenth Circuit's decision "has made obsolete the procedures of extradition, with all of its safeguards employed for more than 200 years, and replaced it with procedure of luring and enticing suspects across state lines." (Petitioner's brief, p. 21). The claim that extradition procedures have been rendered "obsolete" greatly exaggerates the impact of the Tenth Circuit's decision.

Not only has petitioner failed to demonstrate an important federal question, he has failed to demonstrate a conflict among the circuits. This cannot be both a case of first impression and a case in which the circuits are in conflict "in the same matter." Sup.Ct. Rule 17.1(a). What petitioner calls a "narrow" interpretation of the cases of six circuits was simply a recognition by the Tenth Circuit that cases dealing with post-arrest extradition rights are of limited precedential value in determining whether a right to extradition exists prior to arrest. *Id.*, at 1500.

In the absence of an important federal question or a conflict among the circuits, petitioner's application for a writ of certiorari should be denied.

B. Analysis

(1) THE TENTH CIRCUIT'S REASONING IS CORRECT UNDER THE APPLICABLE RULES OF STATUTORY CONSTRUCTION.

In ruling that the petitioner did not have a right to extradition prior to arrest, the Tenth Circuit relied on the plain meaning of Article IV, Section 2, Clause 2 of the United States Constitution and 18 U.S.C. Sec. 3182 (1985).

Article IV, Section 2, Clause 2 states as follows:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall *on demand of the executive Authority of the State from which he fled*, be delivered up to be removed to the State having Jurisdiction of the Crime. (Emphasis added)

Section 3182 of Title 18, which implements the above constitutional provision, states as follows:

Whenever the executive authority of any State or Territory *demand*s any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person *demand*ed with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such de-

mand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged. (Emphasis added)

Both Article IV, Section 2, Clause 2 and 18 U.S.C. Sec. 3182 plainly condition the right to extradition on "demand." As the Tenth Circuit noted, the conclusion that the right to extradition is triggered by demand made by one jurisdiction for the surrender of a person in another jurisdiction is consistent with the Supreme Court's definition of extradition, *see id.*, at 1499-1500 (quoting *Terlinden v. Ames*, 184 U.S. 270 (1902)), and is critical to interstate rendition as well. *Id.*, at 1500 (citing *Innes v. Tobin*, 240 U.S. 127, 133 (1916)).

Given the express reference to "demand" in both Article IV, Section 2, Clause 2 and 18 U.S.C. Sec. 3182, petitioner's contention that the Tenth Circuit "ignores the plain meaning of the Constitutional provision and federal statutes" (Petitioner's brief, p. 11) is insupportable. Article IV, Section 2, Clause 2 does not require that a charging state demand the arrest of a fugitive from an asylum state. Section 3182 provides that upon demand "the executive Authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured," but does not *require* that the executive authority of the charging state demand the fugitive's arrest. Only when the fugitive is taken into custody in the asylum state must extradition procedures be used.

The Court has emphasized that constitutional and statutory provisions should be given their plain mean-

ings when possible. See *United States v. James*, 478 U.S. 597 (1986); *United States v. Turkette*, 452 U.S. 576 (1981); *Rubin v. United States*, 449 U.S. 424 (1981); *United States v. Standard Brewery*, 251 U.S. 210 (1920); *United States v. Hill*, 248 U.S. 420 (1919); *Caminetti v. United States*, 242 U.S. 470 (1917).

Respondents urge this Court to affirm the Tenth Circuit's reasoning and conclusion that there must be a demand by the executive authority of the charging state or an arrest in the asylum state to invoke the extradition process and its attendant rights.

(2) PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner has failed to identify any source in the Constitution or federal law that establishes a pre-arrest right to extradition. Despite the absence of any identifiable constitutional right to extradition prior to arrest, petitioner argues that the Tenth Circuit's decision would render "obsolete the procedures of extradition." (Petitioner's brief, p. 21).

Petitioner's prediction is groundless. Far from doing away with extradition and habeas corpus proceedings, the Tenth Circuit's decision will have little impact on traditional procedures employed to apprehend fugitives. As a practical matter, sting operations of the type executed in this case only snare suspects who can be found in a small radius surrounding a metropolitan area. The Tenth Circuit's decision does not affect the extradition rights of fugitives who are arrested in an asylum state.

Petitioner also argues that the Tenth Circuit's decision will encourage resort to "trickery" as law enforcement authorities attempt to lure fugitives back into their states to avoid having to extradite them, but petitioner fails to explain why the use of trickery is inappropriate to capture suspected criminals who have fled the state, as long as constitutional rights are not violated. Indeed, trickery is a legitimate law enforcement tool. For example, an element of trickery is involved every time a narcotics agent poses as a drug buyer. A risk exists that the wrong person will be lured across the state line, but petitioner has not shown that this risk is significant.

As the Tenth Circuit recognized, *id.*, at 1501, the use of trickery cannot be equated with the use of force. A fugitive who receives a notice that his "package" can be claimed across the state line remains free to stay put. If the fugitive chooses to claim the package, he presumably does so with knowledge that he may be apprehended when he crosses the border.

Finally, petitioner, apparently trying to bolster his policy argument, claims that his arrest has resulted in a criminal record that could adversely affect his livelihood. Mr. Ortega's criminal arrest record, however, was expunged by agreement of the parties and order of the trial court.

This case does not present an important question of federal law that merits Supreme Court review. For this reason, petitioner's application for writ of certiorari should be denied.

(3) THERE IS NO CONFLICT BETWEEN THE TENTH CIRCUIT OPINION AND OTHER CIRCUIT COURTS OF APPEAL.

Although petitioner correctly asserts that this is a case of first impression and that he "has been unable to locate any cases dealing with rights of extradition prior to demand or arrest in an asylum state" (Petitioner's brief, p. 17), he nonetheless argues that the Tenth Circuit "narrowly" interpreted the cases of six circuits to find that a violation of extradition rights occurs only after arrest and transportation of the suspect against his will. See *Draper v. Coombs*, 792 F.2d 915 (9th Cir. 1986); *Ross v. Meagan*, 638 F.2d 646 (3rd Cir. 1981); *Crumley v. Snead*, 620 F.2d 481 (5th Cir. 1980); *Brown v. Nutsch*, 619 F.2d 758 (8th Cir. 1980); *Wirth v. Surles*, 562 F.2d 319 (4th Cir. 1977); *Sanders v. Conine*, 506 F.2d 530 (10th Cir. 1974).

The Tenth Circuit reasonably distinguished the cited cases. The Court noted that "[i]n each of these cases plaintiff was restrained or deprived of his liberty outside the jurisdiction of the state issuing the warrant and then transported against his will." *Ortega*, 875 F.2d at 1500. The Court observed that the question presented in this case "is not so simple." *Id.*, at 1500. Petitioner was arrested in Kansas, the jurisdiction that had issued the warrant for his arrest, and was not transported across the state line. The Court reasoned that because Kansas authorities did not demand that Missouri surrender petitioner, no right to extradition proceedings arose. *Id.*, at 1500.

The "narrow" interpretation assertedly given by the Tenth Circuit does not implicate any of the enumerated principles governing review by certiorari under Sup.Ct.